

# OFFICIAL TRANSCRIPT OF PROCEEDINGS BEFORE THE POSTAL REGULATORY COMMISSION

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In the Matter of: )

COMPLAINT OF CAPITAL ONE  
SERVICES, INC. )

) Docket No.: C2008-3  
)

VOLUME #1

Pages: 1 through 16  
Place: Washington, D.C.  
Date: August 14, 2008

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## POSTAL REGULATORY COMMISSION

In the Matter of: )  
 )  
 COMPLAINT OF CAPITAL ONE ) Docket No.: C2008-3  
 SERVICES, INC. )

Suite 200  
Postal Regulatory Commission  
901 New York Avenue, N.W.  
Washington, D.C.

Volume 1  
Thursday, August 14, 2008

The above-entitled matter came on for a prehearing conference, pursuant to notice, at 2:38 p.m.

BEFORE:

HON. DAN G. BLAIR, CHAIRMAN  
HON. MARK D. ACTON, VICE CHAIRMAN  
HON. TONY L. HAMMOND, COMMISSIONER  
HON. RUTH Y. GOLDWAY, COMMISSIONER  
HON. Nanci E. LANGLEY, COMMISSIONER

APPEARANCES:

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P R O C E E D I N G S

(2:38 p.m.)

CHAIRMAN BLAIR: Good afternoon, everyone.

This is a prehearing conference in Docket No. C2008-3 considering the complaint of Capital One Services, Inc., considering several claims arising from Capital One's unsuccessful attempts to obtain a negotiated service agreement with the Postal Service similar to the agreement that the Postal Service recently commenced with Bank of America.

I'm Dan Blair, Chairman of the Postal Regulatory Commission, and this afternoon I have with me Vice Chairman Mark Acton and Commissioners Ruth Goldway, Tony Hammond and Nanci Langley. I will serve as the presiding officer in this case.

This prehearing conference is being Web broadcast. It will reduce potential confusion if counsel wait to be recognized before speaking, and please identify yourselves when commenting. After you're recognized, please stand and speak distinctly. We have ceiling microphones.

At this point, I would like to ask counsel to identify themselves for the record. Complainant Capital One Services, Inc.?

MS. LEONG: Good afternoon, Chairman and

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1 Commissioners. My name is Joy Leong, along with Tim  
2 Hawkes, representing Capital One Services, the  
3 Complainant. Thank you.

4 CHAIRMAN BLAIR: Thank you. Respondent  
5 United States Postal Service?

6 MS. REED: Good afternoon, Mr. Chairman.  
7 Elizabeth Reed for the Postal Service, and I'm joined  
8 by Frank Heselton.

9 CHAIRMAN BLAIR: Thank you. American Postal  
10 Workers Union?

11 MS. WOOD: Good afternoon. Jennifer Wood  
12 for the APWU.

13 CHAIRMAN BLAIR: Thank you. Bank of  
14 America?

15 MS. MALLON: Good afternoon. Jennifer  
16 Mallon from Venable representing Bank of America.

17 CHAIRMAN BLAIR: Discover Financial  
18 Services?

19 MR. BRINKMANN: Robert Brinkmann  
20 representing Discover Financial Services. Good  
21 morning.

22 CHAIRMAN BLAIR: Thank you. David Popkin?  
23 (No response.)

24 CHAIRMAN BLAIR: The Public Representative,  
25 please?

1 MR. COSTICH: Thank you, Mr. Chairman. Rand  
2 Costich for the Public Representative.

3 CHAIRMAN BLAIR: Valpak Dealers'  
4 Association?

5 MR. MORGAN: Hi, Chairman. Jeremiah Morgan  
6 for Valpak Dealers' Association as well as Valpak  
7 Direct Marketing Systems.

8 CHAIRMAN BLAIR: Thank you. Is there anyone  
9 that I've missed this afternoon?

10 (No response.)

11 CHAIRMAN BLAIR: No? I appreciate your  
12 identifying yourselves for the record.

13 The Commission determined that it would hear  
14 this complaint in Order No. 92. That order noted that  
15 the Postal Service suggested in its pleadings that it  
16 believed there remained the possibility of successful  
17 negotiation of an agreement. The parties were  
18 encouraged to search for common ground and report on  
19 progress at today's conference.

20 Have there been further attempts to resolve  
21 this situation through negotiations?

22 MS. REED: Elizabeth Reed for the Postal  
23 Service. Since we filed the most recent pleadings, we  
24 haven't met to negotiate further, but the Postal  
25 Service is in the process of determining what data we

1 have, what gaps are in the data to further the  
2 potential to sit down and negotiate with Capital One.  
3 We're also taking a look at certain contractual  
4 provisions that we might need to discuss and put  
5 together a draft agenda for a meeting with Capital  
6 One.

7 CHAIRMAN BLAIR: So have there been any  
8 attempts to resolve this through negotiation?

9 MS. REED: Not since the complaint has been  
10 filed. We did have a teleconference between the  
11 attorneys, but we haven't sat down with the  
12 principals.

13 CHAIRMAN BLAIR: Thank you. Complainant?

14 MS. LEONG: Yes. Joy Leong for Capital One.  
15 We did have a teleconference at the Postal Service's  
16 suggestion among the attorneys, and basically the  
17 question was whether to negotiate the baselines and  
18 the discounts, and obviously that's the point of this  
19 complaint. We couldn't at that time identify specific  
20 issues other than that to negotiate, so Capital One  
21 offered to provide any data that was missing and also  
22 to discuss any word changes if those were relatively  
23 minor was my understanding.

24 We also clarified that an NDA had been  
25 signed many, many months ago.

1 CHAIRMAN BLAIR: I'm sorry. A what?

2 MS. LEONG: A nondisclosure agreement had  
3 been signed. There was some confusion about that, so  
4 we sent that over to the Postal Service, our copy, and  
5 we also basically said anything that we can provide  
6 the Postal Service, we're willing to do that. We have  
7 not received any requests at this point and since the  
8 order came out have not been in contact with the  
9 Postal Service on this matter.

10 CHAIRMAN BLAIR: Thank you. The next order  
11 of business is scheduling discovery and evidentiary  
12 hearings. There has already been some discovery in  
13 this case. Ms. Leong, is it your intention to present  
14 evidence in support of the complaint? Your mike is  
15 off.

16 MS. LEONG: May I answer that by referring  
17 to your order, which asks us to be prepared to discuss  
18 how much more discovery we would need, and, frankly,  
19 we've been really working on answering that question.

20 The quandary we are in is that this is the  
21 first significant complaint under the PAEA, and the  
22 PAEA, as you know, made significant changes in  
23 litigation procedures. In other words, because there  
24 is no rate case litigation and no discovery related to  
25 that, the complaint proceeding becomes much more

1 important and the discovery in that. What we were  
2 trying to figure out is how to proceed given that the  
3 rules for complaint proceedings are not out yet. So  
4 we're trying to feel our way through that.

5 The second problem we had in answering your  
6 question is that this is a unique kind of complaint.  
7 It's not a policy complaint in the sense of say the  
8 Time Warner case. This is one more about facts and  
9 circumstances. It's about personal knowledge and a  
10 decision that was made. The decision, we're looking  
11 at why the decision was made, how it was made, the  
12 procedures followed for it, and the effect of that  
13 decision, and therefore, we will need to get personal  
14 knowledge not of our own witnesses unfortunately but  
15 of Postal Service witnesses.

16 That makes the case much more complicated in  
17 terms of discovery. Normally, in a courtroom  
18 litigation, if you wanted to get personal knowledge of  
19 another party's witnesses, you'd have to do document  
20 discovery and depositions. We feel both of those are  
21 very important because how else will we be able to  
22 prove our case if, other folks, we don't know what  
23 they were doing. In fact, we don't even know who the  
24 relevant witnesses are.

25 So we're trying to be as precise in our

1 approach to discovery, and yet, at this point, from  
2 the filing of the answer, we aren't really sure what  
3 issues are still on the table, what are off the table.  
4 We feel that the answer could have been more precise  
5 to help us narrow discovery.

6 So, basically, we're requesting that in  
7 order to know how much discovery we need, we need to  
8 have some ground rules set and to understand how to  
9 proceed, what deadlines there are going to be, how  
10 objections are going to be handled, how depositions  
11 will be handled.

12 CHAIRMAN BLAIR: Well, do you need  
13 additional time for discovery, or is that something  
14 that you aren't in a position to --

15 MS. LEONG: Oh, we will need additional  
16 time. We expect that the Postal Service will not be  
17 anxious to answer all our requests, and we expect that  
18 there will be objections. We are requesting that when  
19 objections are filed, if privileges are asserted, that  
20 there be a privilege log so that we can make sure that  
21 those privileges are not overbroad, that there would  
22 be specificity on what privilege they are asserting  
23 and that they indicate all responsive documents,  
24 because this is really going to be a document case,  
25 and which of those fall under the privilege.

1           We have to have an opportunity to know what  
2       we're talking about, and at this point, we're really  
3       in the dark.

4           CHAIRMAN BLAIR: Following the conclusion of  
5       discovery, would you anticipate additional time being  
6       required on your part?

7           MS. LEONG: Yes. What we were thinking  
8       actually is having discovery -- I can't speak because  
9       I haven't spoken to the other parties who have  
10      intervened, but we were thinking of a first round of  
11      discovery and then followup discovery requests based  
12      on that.

13           There will have to be some filing of  
14      testimony. We don't know what the Postal Service's  
15      intentions are, but this case is so different from a  
16      rate case, there has really been no testimony. We  
17      don't have anything to start with. So we assume that  
18      we will have the opportunity to file testimony, and  
19      the Postal Service, I assume they're going to have  
20      some kind of testimony in defense, and then we will  
21      need time for that discovery, discovery of that  
22      testimony.

23           Then the question is, what happens after  
24      that? Is there rebuttal testimony, which we hope will  
25      not happen? But, of course, that's a right the

1 parties can assert. And then whether we need a  
2 hearing or not, we don't know, but definitely  
3 briefing.

4 I would say that the background of this case  
5 is that we did move to try and resolve some issues  
6 just on the pure legal questions, but the Postal  
7 Service's position was that there mixed questions of  
8 law and fact. So, in order for us to make our factual  
9 case, we really do need to be able to get behind the  
10 decisionmaking of the Postal Service.

11 CHAIRMAN BLAIR: Well, if special procedures  
12 are sought in this case, I would hope that you would  
13 request them by motion. At this point, our current  
14 rules of procedure would continue to apply to this  
15 proceeding until we issue new ones, which we  
16 anticipate doing within the near future.

17 I understand how difficult it is for counsel  
18 to estimate in advance how much time they are going to  
19 need for discovery related to Capital One's direct  
20 case. Nonetheless, the Commission is mindful that  
21 Capital One has claimed current and continuing harm as  
22 resulting from this situation, leading to the  
23 complaint.

24 Therefore, I will be issuing a procedural  
25 schedule that allows a reasonable but limited period

1 for such discovery. Any participant seeking  
2 additional time for discovery directed to Capital One  
3 should provide a detailed justification for extending  
4 this proceeding.

5 Does any counsel have a conflict in the  
6 coming months that I should know about in choosing  
7 hearing dates?

8 MS. LEONG: Chairman, I may not have  
9 answered your question fully about the schedule  
10 because we did try and prepare a schedule with what I  
11 had explained of various rounds. I don't know if that  
12 would be helpful at this point with dates. We have  
13 not talked to other parties about it, but this was  
14 just to give guidance of how we thought we could  
15 proceed.

16 CHAIRMAN BLAIR: You're more than happy to  
17 file those with us, and we'll take those under  
18 advisement.

19 MS. LEONG: Also, could I just point out  
20 that one of the problems in this case as we see it is  
21 that delay is really unlike a normal rate case or an  
22 NSE-approval case. The delay is really not helpful to  
23 the Complainant. Time is on their side, and so if  
24 there are deadlines set, we would request that those  
25 deadlines be strict deadlines that, for example, if

1 responses to requests are due in two weeks, that those  
2 be enforced, that there would be a time for objections  
3 one week from the requests, a deadline for filing of  
4 privilege logs, and that we would be glad to submit to  
5 a deadline for filing a motion to compel as one week  
6 from the date of the response or from the date of the  
7 objection so that we could move this along and not let  
8 delay actually help moot out the case or anything like  
9 that.

10 CHAIRMAN BLAIR: Does the Respondent have an  
11 answer or a comment at this point?

12 MS. REED: The Postal Service certainly  
13 intends to abide by all relevant deadlines through the  
14 course of discovery, and we also would support  
15 limitation of issues to the extent we can focus the  
16 issues we'd be talking about in this complaint and to  
17 be able to resolve this in an expeditious manner.

18 CHAIRMAN BLAIR: As I earlier said, please  
19 file that and we'll consider that under advisement,  
20 but I understand the concerns that you expressed.

21 But getting back to my original question, I  
22 asked if there were any conflicts in the coming months  
23 that we should know about in choosing hearing dates.  
24 I didn't hear any. Public Representative?

25 MR. COSTICH: Thank you. Rand Costich for

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1 the Public Representative. I expect to be out of town  
2 the day before and after Labor Day weekend and also  
3 September 10th through the 20th.

4 CHAIRMAN BLAIR: Okay. We'll keep that in  
5 mind. Thank you, Public Representative.

6 In order to allow you to check your  
7 schedules, I'd ask that you get back with us by close  
8 of business tomorrow. So, if there are no more  
9 responses to that, does any participant have a  
10 procedural matter that you want to raise at this time  
11 other than what the Complainant just did?

12 (No response.)

13 CHAIRMAN BLAIR: Hearing none, I have one  
14 final matter that I'd like to raise before the parties  
15 this afternoon, and I just alluded to that earlier in  
16 my statement, that I expect that the Commission will  
17 shortly issue a notice of proposed rulemaking that  
18 will propose new rules for treating complaints under  
19 39 U.S.C. § 3662.

20 This case was filed consistent with our  
21 current rules, and it's my expectation that we will  
22 adhere to current rules for this case. If new rules  
23 are implemented while this case is ongoing, I will  
24 issue any necessary procedural rulings to clarify the  
25 parties' obligations. Therefore, if there are no

1 further matters to bring before the Commission at this  
2 point, this prehearing conference is hereby adjourned.

3 (Whereupon, at 2:53 p.m., the prehearing  
4 conference in the above-entitled matter was  
5 concluded.)

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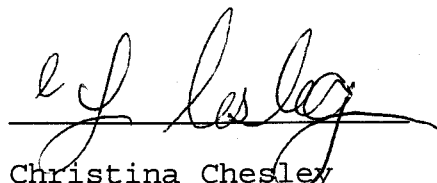
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REPORTER'S CERTIFICATE

DOCKET NO.: C2008-3  
CASE TITLE: Complaint of Capital One Services,  
Inc.  
HEARING DATE: August 14, 2008  
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Postal Regulatory Commission.

Date: August 15, 2008



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